

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

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In the United States Court of Appeals
for the Ninth Circuit

No. 20200

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMBROSE DISTRIBUTING COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforcement of its order issued against Ambrose Distributing Company (herein called respondent) on February 9, 1965, following the usual

¹ The pertinent statutory provisions are printed as an appendix, *infra*, pp. 15-17.

proceedings under Section 10(c) of the Act. The Board's decision and order (R. 34)² are reported at 150 NLRB No. 157. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Wendell, Idaho where respondent maintains a trucking terminal.³

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees concerning their union activities and promising them benefits for refraining from such activities. The Board further found that respondent violated Section 8(a)(3) and (1) of the Act by discharging two employees to discourage union activities. The facts underlying the Board's conclusions are as follows:

² References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" are to exhibits of the General Counsel. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

³ The complaint alleges and the answer admits that "A. N. Ambrose is, and has been at all times material herein, an individual proprietor doing business under the trade name and style of Ambrose Distributing Company" (R. 5, 9, 19). Ambrose is a wholesale distributor of meats and Texaco petroleum products and also hauls freight as a private carrier truck line. No jurisdictional issue is presented.

A. The interference, restraint, and coercion

Approximately 38 truckdrivers work out of respondent's terminal in Wendell, Idaho (R. 19; Tr. 10-11). In September 1963, Richard Byrd, one of these drivers, joined the Union⁴ (R. 19; Tr. 11). Thereafter, until mid-November, he solicited other drivers to join the Union (R. 19; Tr. 12). On December 12, 1963, the Union filed a representation petition and, on February 18, 1964, the Board conducted an election which the Union lost (R. 19; Tr. 4-5).

In mid-December 1963, A. N. Ambrose, the Company's owner, asked Thomas Smith, a driver, what he thought of the "union situation" and cautioned him: "Now, whatever you fellows do, don't vote for the union" (R. 20; Tr. 63). Thereafter, about the middle of January 1964, Ambrose told Smith that he had been thinking for some time about establishing a fund for permanent employees and, although he could not promise to do so, he was considering instituting such plan should the Union be defeated (R. 20; Tr. 63-64).⁵ In early February, Ambrose told Smith that he was going to stop operating the trucks for a period of two weeks until the election was over (R. 21; Tr. 64-65). He then predicted: "Well, if this causes me to lose my Buttrey run, I've

⁴ General Teamsters, Warehousemen, Chauffeurs & Helpers Union, Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Independent).

⁵ Byrd was present when this conversation occurred and his testimony corroborates Smith's (R. 20 n. 4; Tr. 42-43).

got eight trucks sold in Utah . . .” (R. 21; Tr. 65). In mid-February, just prior to the election, Manager Nolan Cooper, told employee Ernest Bartee that, if the Union won the election, respondent would reduce its operations so that not more than five trucks would be kept running (R. 19; Tr. 92). A day or two after the election, Cooper told Bartee that he had a list of 15 drivers he thought voted for the Union. He said he would have to cross off four names since the Union received only 11 votes. Cooper threatened that those on the list would be “sent down the road” (R. 19; Tr. 94). All of the foregoing evidence is substantially ⁶ uncontradicted (R. 20).

B. *The discharges*

Richard Byrd—On January 4, 1964, Cooper accused Byrd of being the “instigator of this union business” and said that he had had “two guys in [his office] that swore that [Byrd] signed them up” (R. 19; Tr. 14). About January 20, while Byrd was talking to employee Gene Kuhn in the shop at Wendell, Ambrose approached them and cautioned Kuhn: “Be careful what you say, Byrd is going to be the new shop steward in the union” (R. 20; Tr. 16).

In January, Byrd narrowly avoided colliding with another vehicle and scraped his trailer against a guardrail of a bridge, but the only damage was some scratches in the paint (R. 20; Tr. 38-40). Byrd

⁶ Ambrose did deny in general terms that he had ever threatened to curtail operations if the employees joined the Union (R. 21, n. 7; Tr. 111).

mentioned the incident to shop employees at Wendell, and Ambrose learned of it through them (R. 20; Tr. 40-42). On the occasion in mid-January when Ambrose spoke to Byrd and Smith concerning the possibility of establishing a fund for permanent employees should the Union be defeated, Ambrose volunteered that he was a fair man and would not bear resentment against an employee who had signed a card designating the Union as his bargaining representative (R. 20; Tr. 43). Ambrose went on to say that, if this were not so, he could have used the scratched-paint incident to discharge Byrd (R. 20; Tr. 43).

In February, Ambrose told Smith that he could not understand why Byrd was for the Union considering the help he had given Byrd in the past ⁷ (R. 21; Tr. 66). After the election, when Cooper showed employee Bartee the list of employees he suspected were union sympathizers, Bartee noted that the names of Byrd and Smith were included (R. 19; Tr. 93). At this time, Cooper told Bartee that Byrd and another driver, S. C. ("Dutch") Dillon, were promoting the Union (R. 19-20; Tr. 94). In late February, about a week after the election, Cooper upbraided Byrd for stirring up trouble and for reporting to an investigating Board agent what Cooper had said to Byrd about the Union (R. 20; Tr. 20-22). Cooper accused Byrd of not having enough courage to fight

⁷ In various business arrangements, respondent had extended credit and assistance to Byrd (R. 19; Tr. 109-110).

his own battles and of having to call in outsiders for help (R. 20; Tr. 22).

In early March, Byrd and another driver left a trailer at respondent's yard in Butte and proceeded on to other destinations (R. 20; Tr. 25-26). On March 11, Ambrose telephoned Byrd and asked him if he had delivered a trailer of grain to Butte (R. 20; Tr. 23). When Byrd said that he had, Ambrose told him that he had not properly lowered the landing gear on the trailer, that, as a result, the trailer had been damaged, and that it had taken five hours to jack the trailer up to its proper position (R. 20-21; Tr. 23). Byrd asserted that the trailer had been correctly uncoupled from the tractor and was safely set when he left it (R. 21; Tr. 23). Despite Byrd's denial, Ambrose said that, considering the quality of the work Byrd had been doing recently and the fact that he had struck a bridge sometime earlier, he was discharged (R. 21; Tr. 23). At this point, Byrd became angry and called Ambrose a liar, asserting that Ambrose knew he had not damaged any trailer in Butte (R. 21; Tr. 23). Ambrose replied: "Well that doesn't make any difference. I've got about five guys up here that will swear that you did" (R. 21; Tr. 24). Ambrose then said that he should have been given some help when he needed it and that Byrd, in consideration of all that had been done for him in the past, was one who should have supplied it (R. 21; Tr. 24). Byrd has not since worked for respondent (R. 21; Tr. 109).

Thomas Smith—In late February or early March, Smith was given a driving assignment which he said

he could not accept because he had no money (R. 21; Tr. 67). When Ambrose telephoned him to inquire about the difficulty, Smith explained that several pay and expense checks were due him and that part of the expense money given him had been spent for groceries (R. 21; Tr. 67-68). At Ambrose's direction, Smith went to the Wendell terminal (R. 21; Tr. 68). There, Ambrose accused him of causing trouble. When Smith questioned what trouble he had caused, Ambrose referred to the "union deal." Smith rejoined that no one knew how he had voted or would ever know. (R. 21; Tr. 68-69.) After some further discussion, Ambrose made a personal loan to Smith of \$200 (R. 21; Tr. 69).

About the middle of March, while driving a truck in Canada, Smith jackknifed the trailer, causing damage which Smith estimated would take less than \$200 to repair (R. 21; Tr. 70-72). Smith telephoned his dispatcher in Butte who instructed him to continue his trip (R. 21; Tr. 72). About March 18, Smith arrived in Butte, and after the truck was repaired, Smith delayed in the Butte office waiting for an expense check (R. 21; Tr. 72-74). Ambrose instructed Smith to proceed to Wendell, assuring him that he would bring the check down in a day or two, adding "You won't be going out before Sunday, anyway" (R. 21; Tr. 74).

On Saturday, March 21, Smith met Ambrose at the Wendell office (R. 21-22; Tr. 75). Ambrose said: "Tom, you sure have me in a bind." Smith asked how that was so and Ambrose explained: "You know

I fired those fellows⁸ the other day that dropped that trailer up in Butte." Smith acknowledged that he had heard about it. Ambrose then proceeded to say, in effect, that, if he did not now discharge Smith, the Union would force him to take the other men back to work. (R. 22; Tr. 75-76.) Ambrose suggested that although he was discharging Smith, he would arrange for Smith to continue work by hauling hay in Smith's own truck. After several further conversations, in which Ambrose allayed Smith's fears that there would be insufficient business to make such a venture profitable, Smith purchased a truck and readied himself for this work. When, about the middle of April, he telephoned Ambrose and reported that he was prepared to start hauling, Ambrose informed him that he did not think there would be any hay for him to haul. This was the last conversation Smith had with Ambrose. (R. 22; Tr. 76-79.)

II. The Board's Conclusions and Order

On these facts, the Board concluded that respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities, threatening them with reprisals for engaging in such activities, and promising them benefits for refraining from such activities (R. 23, 24, 34). The Board also concluded that respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Byrd for his union activities and by discharging em-

⁸ Although, according to Smith's testimony, Ambrose used the plural, there is no evidence that anyone other than Byrd was fired.

ployee Smith "because of [its] fear that failure to take this action might strip from the discharge of Byrd the mantle of legality with which [it] had sought to clothe [that discharge]" (R. 23, 24, 34).

Accordingly, the Board ordered respondent to cease and desist from the unfair labor practices found and in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. Affirmatively, the Board ordered respondent to offer full reinstatement to Byrd and Smith, to make them whole with backpay plus interest, and to post the usual notices (R. 25-26, 34).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) of the Act

The evidence summarized above, pp. 3-9, establishes that, both before and after the election, respondent unlawfully attempted to undermine its employees' support of the Union. Thus, about the time that the Union filed its representation petition with the Board, Ambrose himself coercively interrogated employee Smith concerning union activities and cautioned him: "Now, whatever you fellows do, don't vote for the Union" (R. 20; Tr. 63). Thereafter, Ambrose sought to induce the employees to abandon the Union by suggesting that a fund for permanent employees would be established if the Union was defeated in the election and by threatening that large-scale layoffs would occur if the Union won. Man-

ager Cooper also threatened the retaliatory dismissals of all those who voted for the Union. That such conduct constitutes interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act is too well settled to require extended discussion. *N.L.R.B. v. Action Wholesale Company, Inc.*, 342 F. 2d 798 (C.A. 9), enforcing 145 NLRB 627; *N.L.R.B. v. Kit Manufacturing Company*, 292 F. 2d 686, 688 (C.A. 9); *N.L.R.B. v. California Compress Co.*, 274 F. 2d 104, 106 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 707-708 (C.A. 9); *Carpenteria Lemon Assn. v. N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9), cert. denied, 354 U.S. 909; *N.L.R.B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 261-263 (C.A. 9), cert. denied, 348 U.S. 829.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act

A. Byrd's discharge

The Board's finding that respondent discharged employee Byrd because of his union activities is amply supported by the record. Byrd spearheaded the union drive at the Wendell terminal, and Ambrose was fully aware of this fact. Manager Cooper told Byrd and, later, another employee, that Byrd was the union instigator or promoter (R. 19-20; Tr. 14, 94). Ambrose also complained to Smith of what he considered to be Byrd's disloyalty and ingratitude in supporting the Union (R. 21; Tr. 66), and Cooper upbraided Byrd for cooperating with a Board agent assigned to investigate alleged interference with the

employees' organizational rights (R. 20; Tr. 20-22). Cooper also threatened that the union adherents would be "sent down the road" (R. 19; Tr. 94), and Ambrose warned Byrd that his union activities might result in a discharge were Ambrose not a "fair" man (R. 20; Tr. 43). Subsequently Byrd was summarily discharged.

Respondent contends that Byrd was not discharged for his union activities but because he damaged a trailer by improperly lowering its gear when he deposited it at respondent's yard in Butte. Other than Ambrose's testimony, however, the record contains no evidence that any trailer was, in fact, damaged and the Trial Examiner generally discredited him as a witness (R. 22, n. 8). In addition, if an investigation had been made of the incident, it would have shown that Byrd was the "second driver" on the run in question and, therefore, that he was not solely responsible for uncoupling the trailer (Tr. 24-25).⁹ Moreover, the alleged damage was not discovered until a week after the trailer had been parked at the yard (Tr. 108) and, thus, it was quite possible that any damage resulted from some cause other than the initial adjustment of the landing gear.

Even if the Company had reason to believe that a trailer was damaged due to negligence on Byrd's part, it is clear that respondent used this circumstance as a pretext to rid itself of the man it correctly identified as the key union supporter at the Wendell terminal. When Ambrose telephoned Byrd

⁹ There is no evidence that any disciplinary action was taken against the "first driver."

and told him that he had damaged the trailer deposited in Butte, Byrd denied that he had and asserted that the trailer had been properly uncoupled and was set safely at the time he left it. Despite Byrd's denial, Ambrose proceeded to discharge him. After Byrd accused Ambrose of knowing that he had not damaged the trailer, Ambrose rejoined: "Well, that does not make any difference. I've got about five guys up here that will swear that you did" (R. 21; Tr. 24). Ambrose then "made a short statement about of all the people that should have helped him when he needed help, [Byrd] was one that certainly should have" (R. 21; Tr. 24). This concluding comment was an obvious reference to Byrd's support of the Union. Ambrose's remarks, which were established by uncontradicted testimony, clearly show that he was determined to effect Byrd's discharge no matter where the fault, if any, lay in connection with trailer damage and that the discharge was in retaliation for Byrd's union activities.

In view of respondent's attempts to defeat its employees' organizational efforts, the knowledge of Byrd's leadership of those efforts, and the circumstances of his discharge, we submit that the Board properly rejected respondent's explanation for the discharge and found instead that the discharge was discriminatorily motivated. *N.L.R.B. v. Argentum Mining*, 296 F. 2d 219 (C.A. 9), enforcing 129 NLRB 439; *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705 709-710 (C.A. 9); *N.L.R.B. v. Homedale Tractor & Equipment Co.*, 211 F. 2d 309, 313-314 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B. v.*

Dant & Russell, 207 F. 2d 165, 166-167 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

B. *Smith's Discharge*

As stated above, the Board found that Smith was discharged in order to lend credence to respondent's asserted reason for discharging Byrd. When Smith arrived in Butte following the accident in which his trailer had been damaged, Ambrose gave no hint that any disciplinary action would be taken. Smith was simply instructed to proceed to Wendell and wait for his check which would be delivered before he was dispatched again. When, three days later, Smith was summarily discharged, Ambrose made no attempt to justify the action on the ground that Smith was at fault in the accident. Rather, he admitted that he was forced to discharge Smith because, unless he did so, it might appear that he had discriminated against Byrd and, thus, he might be pressured into reinstating him. Since respondent openly confessed an unlawful motive for Smith's discharge—that is, to give “an appearance of legitimacy” to the discriminatory discharge of Byrd—the Board properly found that the dismissal of Smith was also a violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Superex Drugs, Inc.*, 341 F. 2d 747, 749 (C.A. 6); *Wonder State Mfg. Co. v. N.L.R.B.*, 331 F. 2d 737, 738 (C.A. 6); *N.L.R.B. v. Williams*, 195 F. 2d 669, 672 (C.A. 4), cert. denied, 344 U.S. 834.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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August 1965

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall

be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

The following table of exhibits is presented pursuant to Rule 18(f) of the Rules of the Court. References are to the typewritten transcript of testimony ("Tr.") :

EXHIBITS—GENERAL COUNSEL

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>	<u>Withdrawn</u>
1-a—1-i	3	3	4	
2	4	3	4	
3	19	19		20